No. 191.

ANTHONY DOHERTY,

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,

Defendant in Error.

No. 468.

UNITED STATES OF AMERICA,

Appellant,

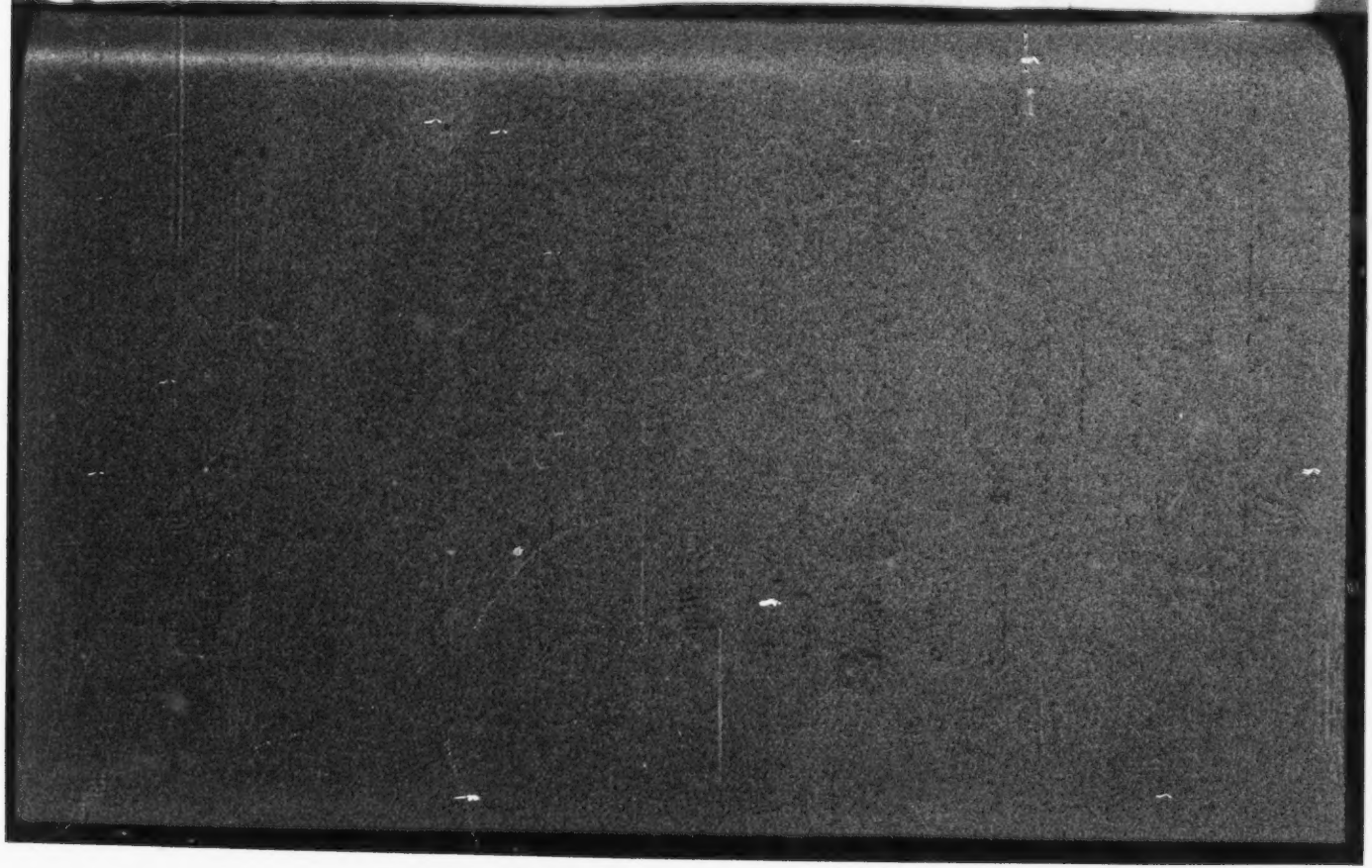
vs.

NORTHERN PACIFIC RAILROAD COMPANY, NORTHERN PACIFIC RAILWAY COMPANY, and EDWIN H. McHENRY and FRANK G. BICKLOW, as receivers of the Northern Pacific Railroad Company,

Appellees.

ARGUMENT FOR DEFENDANT IN ERROR AND APPELLEES.

C. W. BUNN and
JAMES B. KERR,
Counsel for Defendant in Error and Appellees.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 121.

ANDREW DOHERTY,
Plaintiff in Error.

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
Defendant in Error.

No. 408.

UNITED STATES OF AMERICA,
Appellant,

vs.

NORTHERN PACIFIC RAILROAD COMPANY, NORTHERN PACIFIC RAILWAY COMPANY, and EDWIN H. MCHENRY and FRANK G. BIGELOW, as receivers of the Northern Pacific Railroad Company,
Appellees.

ARGUMENT FOR DEFENDANT IN ERROR AND APPELLEES.

STATEMENT.

The two cases above entitled depend upon substantially the same facts and involve the same

question. The court directed that they be heard, in argument, as one case. The same brief is, therefore, presented in both cases.

The Doherty case is before the court on a writ of error directed to the supreme court of Wisconsin. The opinion is printed in the transcript pp. 105-114, and reported in 100 Wis. p. 39. It involves the title of the defendant in error to a piece of its right of way between Superior and Ashland, Wisconsin.

The United States case is before the court on the appeal of the United States from a judgment of the circuit court of appeals for the eighth circuit affirming a judgment of the circuit court for the district of Minnesota dismissing a bill in equity filed by the United States to set aside a patent to the Northern Pacific Railroad Company, on the ground that the land conveyed by the patent was outside the limits of the Northern Pacific grant. The land involved lies in Minnesota and was patented by the United States to the company on account of its line between Superior and Ashland. The opinion of the circuit court is printed in the transcript pp. 161-166, and the opinion of the court of appeals is printed in the transcript pp. 161-166, and reported in 95 Fed. Rep. p. 864.

Both cases were heard upon agreed statements of fact and the question is presented: where is the eastern terminus of the Northern Pacific Railroad? It is contended by both Doherty and the United States that the terminus was fixed at Duluth, or if not at Duluth, then at Superior City, Wisconsin. It is contended by the defendant in error and ap-

pellees that the terminus was fixed at Ashland, Wisconsin. Reference will be made to the record in the Doherty case as "Case No. 121, transcipt p ------," and in the United States case as "Case No. 408, transcript p-----."

The facts upon which the question of the location of the terminus depends are as follows:

The Northern Pacific Railroad Company was created by act of congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound on the Pacific coast by the northern route." (13 *Stat. at Large*, 365.)

It is provided by the first section of this act as follows:

> "And said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior, in the state of Minnesota or Wisconsin; thence westerly by the most eligible route as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget's Sound. * * *"

By section 3 of the act of July 2, 1864, lands were granted to aid in the construction of the proposed railroad to the amount of ten alternate sections per mile on each side of the line within the states, and twenty alternate sections in the territories, with a right of indemnity for lands excepted from the grant within ten miles of the limits of

such alternate sections. (Case No. 121, transcript p. 29; Case No. 408, transcript p. 114.)

By the joint resolution of congress of May 31, 1870, a further indemnity belt ten miles in width, on each side of the line, was created, from which the compny was entitled to satisfy losses occurring after the date of the grant which could not be satisfied within the first indemnity limits of the state or territory wherein they occurred. (Case No. 121, transcript p. 35; Case No. 408, transcript p. 118.)

The act required an acceptance of its terms and impositions by the company within two years from its approval, and this was given December 29, 1864. (Case No. 121, transcript p. 35; Case No. 408, transcript p. 118.)

Section 18 of the granting act required the company to obtain the consent of the legislatures of the several states through which the road should pass previous to commencing the construction thereof, and in the year 1865 the legislatures of Minnesota and Wisconsin gave such consent. (Case No. 121, transcript pp. 36-38; Case No. 408, transcript pp. 118-123.)

In 1870, the company located the general route of its railroad from the mouth of the Montreal River, in Wisconsin, a point about thirty miles east of Ashland, across the states of Wisconsin and Minnesota, to a point on the Red River of the North, near Fargo, on the boundary between Minnesota and the then territory of Dakota. A map showing this location of the general route was, on August 13, 1870, transmitted by the company to

the secretary of the interior. (Case No. 121, transcript p. 39; Case No. 408, pp. 123-4.)

Copies of this map are before the court marked "Exhibit 1," in case No. 121, and "Exhibit 4," in case No. 408.

Upon receipt of this map, and on August 13, 1870, the secretary transmitted it to the commissioner of the general land office, with instructions to withdraw from sale, homestead and pre-emption, all odd-numbered sections of land within twenty miles of the line so designated within the states of Wisconsin and Minnesota. (Case No. 121, transcript p. 39; Case No. 408, transcript p. 124.)

Thereupon, the commissioner of the general land office withdrew the odd sections within twenty miles of the line of general route in Wisconsin and increased in price to $2.50 per acre all even numbered sections of public land within those limits. (Case No. 121, transcript p. 40; Case No. 408, transcript p. 125.)

Thereafter, whenever cash payment was required by law in the disposition of any of said even-numbered sections, the district officers demanded payment therefor at the rate of $2.50 per acre, and the United States disposed of large quantities of land so situated, and received payment therefor at the rate of $2.50 per acre. (Case No. 121, transcript p. 40; Case No. 408, transcript p. 125.)

In the year 1882 the chief engineer of the Northern Pacific Railroad Company prepared a map showing the proposed line of the definite location of said railroad from a point on the St. Paul & Du-

luth Railroad (formerly the Lake Superior & Mississippi Railroad) in section one (1), twonship forty-eight (48), north of range seventeen (17), west of the fourth principal meridian, Minnesota (now known as Thomson Junction), easterly to a point in section fifteen (15), township forty-seven (47) north, of range two (2) west of the fourth principal meridian, Wisconsin, and, on May 9, 1882, the executive committee of the board of directors, duly authorized so to do, adopted the following resolution:

> "The chief engineer, having made and forwarded a map or plat of that part of the company's main line of railroad which extends from a point on said main line in section 1, of township 48 north, of range 17 west of the fourth principal meridian, in the state of Minnesota, to the crossing of Bad river to section 15 of township 47 north, range 2, west of said meridian, in the state of Wisconsin, duly verified by his affidavit on the 17th day of April, 1882, whereon is indicated by a red line the said definite location, and the same being carefully considered, it was, on motion of Mr. Harris:
>
> "Resolved, That the said map or plat be, and the same is hereby approved; and the line of the Northern Pacific Railroad as above described is hereby definitely fixed on, and according to the said red line indicated and laid down on said map. And the president of the company is requested to certify the said plat and cause it to be filed in the office of the commissioner of the general land office." (Case No. 121, transcript p. 41; Case No. 408, transcript p. 125-6.)

This map was, accordingly, duly certified by the officers of the company and verified by the chief

engineer, and transmitted by the president of the company to the secretary of the interior for filing in the office of the commissioner of the general land office. (Case No. 121, transcript p. 41-43; Case No. 408, transcript p. 127.)

Copies of this map are before the court marked "Exhibit 2" in case No. 121, and "Exhibit 6" in case No. 408.

This map of definite location was thereupon, and on July 6, 1882, duly transmitted to the commissioner of the general land office by the secretary of the interior, and thereafter, and on November 22, 1882, the secretary instructed the commissioner to adjust the grant to the Northern Pacific Railroad Company in accordance with the maps of definite location, including the map just mentioned, in so far as the railroad had been constructed. (Case No. 121, transcript pp. 43-44; Case No. 408, transcript pp. 128-129.)

Thereupon the commissioner of the general land office prepared a diagram showing twenty, thirty and forty mile limits on each side of said line of definite location, extending eastward from Thomson Junction as far as the road had then been constructed, a distance of twenty-five miles. These limits were respectively the limits of the lands in place, the indemnity belt created by the act of July 2, 1864, and the additional, or second, indemnity belt created by the joint resolution of May 31, 1870. This diagram the commissioner transmitted to the district land officers at Bayfield, Wisconsin, on January 5, 1883, together with a letter of in-

structions directing them to withhold from sale, pre-emption and homestead all the odd-numbered sections within the designated limits, and as before, upon the location of the general route, to hold all even-numbered sections within twenty miles of the line at a minimum price of $2.50 per acre. (Case No. 121, transcript pp. 44-45; Case No. 408, transcript pp. 129-130.)

On May 17, 1883, the secretary of the interior further instructed the commissioner to withdraw all odd-numbered sections of land within thirty miles of said line of definite location, without reference to the construction of the road, and the commissioner, on June 22, 1883, took action similar to that taken by him on January 5, 1883, and extended the withdrawal of lands within the thirty-mile limits the full length of said line of definite location. (Case No. 121, transcript pp. 45-46; Case No. 408, transcript pp. 131-132.)

On October 8, 1883, the secretary directed the commissioner to extend the withdrawal to the forty-mile or second indemnity limits, the full length of the definite location in Wisconsin, and in accordance with these instructions the commissioner so directed the local officers at Bayfield. (Case No. 121, transcript pp. 46-47; Case No. 408, transcript pp. 132-133.)

The board of directors of the Northern Pacific Railroad Company, on August 20, 1884, adopted the following resolution:

> "Resolved, That the eastern terminus, or point of beginning of the Northern Pacific Railroad on Lake Superior be and the same is

> hereby fixed, determined and established at a point at the city of Ashland, on Lake Superior, in the county of Ashland, in the state of Wisconsin, in section 27, township 48 north, of range 4 west of the fourth principal meridian."

A copy of this resolution, duly certified, was transmitted to the commissioner of the general land office on December 3, 1884. (Case No. 121, transcript p. 47; Case No. 408, transcript pp. 133-134.)

Thereafter, the commissioner of the general land office prepared a diagram showing the final eastern terminal of said line as fixed by the above resolution, and on February 3, 1887, transmitted the same to the district officers at Bayfield, Wisconsin, together with a letter of instructions, wherein he recites the filing of the maps of general route and definite location, and the fixing of the eastern terminal at Ashland, and directs the adjustment of the grant on the basis of the location and terminal so fixed. (Case No. 121, transcript pp. 48-49; Case No. 408, transcript pp. 134-135.)

Copies of this diagram are before the court marked "Exhibit 3" in case No. 121, and "Exhibit 7" in case No. 408.

The point at Ashland so fixed as the terminus is substantially on the line of definite location as defined by the map of July 6, 1882, but about twelve miles west of the most easterly point shown on that map. A spur of about a mile in length leaves this line at a point in the city of Ashland, and by this means actual contact with the waters of Lake Superior is effected.

The road was constructed eastward from Thomson Junction to Ashland, and westward from Thomson to a point fifty-five miles west of Helena, Montana, and was constructed eastward from Wallula Junction, in the territory of Washington, a point east of the Cascade Mountains, to said point fifty-five miles west of Helena, and these portions of the line were united at the last mentioned point in August, 1883. During the years 1885, 1886 and 1887 the company constructed its road from a point on the line about sixteen miles north of Wallula Junction over the Cascade Mountains to Tacoma, on Puget's Sound. (Case No. 121, transcript p. 49; Case No. 408, transcript pp. 135-136.)

The portion of the road extending eastward from Thomson Junction to Ashland was constructed on the line of definite location, as shown by the map of 1882, in the years 1881, 1882, 1883 and 1884, and was examined in three sections by commissioners appointed by the president of the United States, as provided by section 4 of the act of July 2, 1864. (Case No. 121, transcript p. 50; Case No. 408, transcript p. 136.)

The first of these three sections extended from Thomson Junction to Bluff Creek, a point within the corporate limits of Superior City, a distance of twenty-five miles, and was constructed in 1881 and 1882. The commissioners appointed to examine the same duly reported that this section was constructed in compliance with the act of congress of July 2, 1864, and this report was transmitted to the president by the secretary of the interior, with

a recommendation that the report be accepted and that patents be issued for lands earned by its construction. These recommendations were approved by President Arthur, Sept. 16, 1882. (Case No. 121, transcript pp. 50-51; Case No. 408, transcript pp. 137-138.)

The second section of twenty-five miles of road, extending from Bluff Creek to the Brule River, was constructed in the latter part of the year 1883. This section was in like manner examined by commissioners, reported favorably, its acceptance recommended by the secretary, and the report approved by the president, January 31, 1884. (Case No. 121, transcript pp. 51-52; Case No. 408, transcript pp. 138-139.)

The third section, extending from the Brule river to Ashland, a distance of thirty-seven and one-half miles, was constructed in 1884, and was duly examined by commissioners, who reported in favor of its acceptance. This report, on the recommendation of the secretary of the interior, was approved by the president February 6, 1885. (Case No. 121, transcript pp. 52-53; Case No. 408, transcript pp. 139-140).

As part of the case of Doherty and of the United States, the following facts are stipulated:

That the map or plat marked "Exhibit A" in case No. 121, and "Exhibit I" in Case No. 408, is a true and correct copy of a certain map or plat now in the office of the commissioner of the general land office, which said map or plat was transmitted by Josiah Perham, president of the Northern Pacific

Railroad Company, to the secretary of the interior on March 6, 1865, together with a letter in which it was stated that the map or plat showed the general line of the Northern Pacific Railroad from a point on Lake Superior, *in the State of Wisconsin,* to a point on Puget Sound. (Case No. 121, transcript p. 53; Case No. 408, transcript p. 103).

This map shows upon its face, as indicated on the copy, two lines; one starting at the mouth of the Montreal river in Wisconsin and extending over and across the states of Wisconsin and Minnesota and traversing a portion of the territory of Dakota; the other line, commencing at or near Duluth, and extending across the state of Minnesota to a point in the territory of Dakota, where the two lines converge, and thence a single line extending to Puget Sound. The line starting at the mouth of the Montreal river is erased by a wavy line drawn over it.

Upon receipt of this map, the secretary of the interior transmitted the same, together with the letter of President Perham, to the commissioner of the general land office, and in a communication addresssed to that officer, suggested a withdrawal of the lands along the line indicated on the map in Minnesota and *Wisconsin.* (Case No. 121, transcript p. 54; Case No. 408, transcript pp. 104-105).

Upon the receipt by the commissioner of the general land office of this map, he addressed a communication to the secretary of the interior, in which he recommended that the map be rejected for the reason that it did not comply with the rules of

the land department. (Case No. 121, transcript p. 101; Case No. 408, transcript pp. 105-107).

In the Doherty case it is stipulated that the secretary of the interior approved the recommendation of the commissioner by endorsement on his letter (transcript p. 101), but in the United States case it is stipulated that there is endorsed on the letter of the commissioner the words "Sec'y sustains comm's refusal," (transcript p. 108) and that except as above stated, the department of the interior has never taken any action under or relative to said map, or made any withdrawal of lands thereunder. (Case No. 408, transcript p. 109).

The minutes of the board of directors of the Northern Pacific Railroad Company from December 7, 1864, the date of the first meeting of said board, up to the 18th day of May, 1865, show no action by said board with reference to locating the line of the Northern Pacific Railroad, and said minutes do not show any action conferring special authority upon the president of the company to locate said line. (Case No. 121, transcript p. 100; Case No. 408, transcript p. 108).

The powers of the president as conferred by the by-laws, are set out and are confined to presiding at meetings of the board of directors and exercising a general supervision over the affairs of the company. (Case No. 121, transcript p. 100; Case No. 408, transcript pp. 109-110).

By an act approved May 5, 1864, entitled "An Act making a grant of lands to the state of Minnesota to aid in the construction of the railroad from

St. Paul to Lake Superior," congress made a grant of ten sections of land per mile to aid in the construction of the road named in the title. This grant was duly conferred by legislation of the state of Minnesota upon the Lake Superior & Mississippi Railroad Company, a corporation created under the laws of that state, afterward known as the St. Paul & Duluth Railroad Company. (Case No. 121, transcript pp. 55-57; Case No. 408, transcript pp. 102-103).

By an agreement entered into on the 9th day of July, A. D. 1870, between the Northern Pacific Railroad Company, the Lake Superior & Mississippi Railroad Company, the Western Land Association and the Lake Superior & Puget Sound Company, it was agreed that the Northern Pacific Railroad Company should so connect its road with that of the Lake Superior & Mississippi Company at or near the Dalles of the St. Louis river as to open direct communication by rail with the town of Duluth, and should enter into running arrangements with the Lake Superior & Mississippi Railroad Company on terms that should be just and equitable to accomplish that object, and that the Northern Pacific Railroad Company should make its first connection east from the point of intersection with the Lake Superior & Mississippi Railroad Company by way of the line of the said last mentioned company over Rice's or Minnesota Point, and that it would not build any other road so as to form a connection running eastward of the Lake Superior & Mississippi Railroad north of Wyoming previous

to the completion of its road to the Missouri river. (Case No. 408, transcript pp. 11-16).

This agreement does not appear in the Doherty case.

On November 21, 1871, the Northern Pacific Railroad Company filed a map of definite location of that portion of its road extending from Thomson Junction in the state of Minnesota, westward a distance of two hundred and twenty-eight and two-tenths miles, to Fargo, on the Red River of the North, on the eastern boundary of the territory of Dakota. (Case No. 408, transcript p. 110).

The letters of transmittal from the railroad company to the secretary of the interior, and from the secretary of the interior to the commissioner of the general land office, which were filed with this map, and the map itself, show that the eastern point indicated thereon is Thomson Junction and not Duluth, as was intimated in the brief of the government in the court of appeals. (Case No. 408, transcript pp. 157-158). The map is "Exhibit 2" in case No. 408, but does not appear in the Doherty case.

On January 1, 1872, the Lake Superior & Mississippi Railroad Company had constructed and was operating a railroad from St. Paul to Duluth by way of the village of Thomson, and on that day the Northern Pacific Railroad company purchased a half interest in that portion of the road extending from Thomson to Duluth, a distance of twenty-six miles, for a consideration of five hundred thousand dollars. (Case No. 121, transcript pp. 58-63; Case No. 408, transcript p. 111, pp. 17-24).

On the same day, January 1, 1872, the two companies entered into an agreement in writing for the operation of the portion of the road in which the Northern Pacific Company had acquired a half interest. (Case No. 121, transcript pp. 64-70; Case No. 408, transcript p. 111, pp. 25-33). This agreement has to do with the operating of trains and the maintainance of the road. It provides for a schedule of trains and for rules and regulations for the running of trains, to be agreed upon between the superintendents of the two companies.

On May 1, 1872, the Northern Pacific Company and the Lake Superior & Mississippi Company entered into a further agreement, by the terms of which the Lake Superior & Mississippi Company leased to the Northern Pacific its line extending from St. Paul to Duluth, and assigned to the last named company its interest under three certain leases executed to it by the Stillwater and St. Paul, the Minneapolis & Duluth and Minneapolis and St. Louis Railroad Companies, of their respective lines of railroad then under construction. By the terms of the agreement the Northern Pacific Company agreed to pay as annual rental for the lines of road a sum equal to thirty per centum of the gross earnings thereof, except that portion from Thomson to Duluth where the Northern Pacific was allowed the benefit of its half ownership. The land grant of the Lake Superior & Mississippi Company is expressly excepted from the operation of the lease. (Case No. 121, transcript pp. 71-89; Case No. 408, transcript p. 111, pp. 34-57).

On the 21st day of April, 1874, the Northern Pacific Railroad Company surrendered all rights conferred by the lease of May 1, 1872, by executing a formal relinquishment of all its interest under the lease and assignments. (Case No. 121, transcript pp. 89-97; Case No. 408, transcript pp. 141-149).

The Northern Pacific Railroad Company operated the line of railroad extending from Thomson Junction to Duluth, a distance of about twenty-six miles, in which the Northern Pacific Company acquired a half interest by deed of conveyance of January 1, 1872, for a period of about fourteen years, to-wit, from the first day of January, 1872, to about the first day of January, 1886. The line was then abandoned by the Northern Pacific Company, and has since been unused. (Case No. 408, transcript p. 149).

In the United States case it further appears that in the month of February, 1873, the directors of the Northern Pacific Railroad Company were informed that claim was made by the officers of the Lake Superior & Mississippi Railroad Company that the effect of that certain deed of conveyance of January 1, 1872, whereby the Lake Superior & Mississippi Company conveyed to the Northern Pacific Company a half interest in that portion of its road extending from Thomson Junction to Duluth, was to fix the eastern terminus of the Northern Pacific Railroad at Duluth, and thereupon by resolution duly adopted on the 13th day of February, 1873, the directors of the Northern Pacific Company called upon the Lake Superior & Mississippi Company for

an agreement construing the agreement of January 1, 1872, so that the same should not be held to intend or have intended to fix the eastern terminus of the Northern Pacific Railroad at Duluth; and thereafter and on the 2nd day of June, 1873, the Lake Superior & Mississippi Railroad Company, by resolution of its board of directors, duly adopted, agreed with the Northern Pacific Railroad Company that said agreement of January 1, 1872, should not be held to intend or have intended that the eastern terminus of the Northern Pacific Railroad should be, or was, by virtue of said agreement of January 1, 1872, established at Duluth. (Case No. 408, transcript pp. 140-141).

The record in this case also shows that the Northern Pacific Railroad Company has never claimed to be entitled to receive any lands from the United States on account of said line of railroad extending from Thomson Junction to Duluth, and it has never received any lands whatsoever on account of that line. (Case No. 408, transcript p. 149).

It has been claimed by the government that the title to more than a million acres of land will be determined by this suit. It appears, however, that there are within the place limits of the grant east of Thomson Junction, only eight sections or 5,120 acres of land, which are subject to the grant; and in the indemnity limits, only 52,546 acres. (Case No. 408, transcript p. 152.)

It is true that if the lands were to be found within the indemnity limits west of Thomson

Junction, the company would be entitled to select a large quantity in lieu of the losses from the place limits between Thomson and Ashland, but there is an ascertained deficiency in the indemnity limits, which will render it impossible for the company to satisfy any portion of these losses. See certificate of the commissioner of the general land office, reported to the senate, and printed as Senate Document 150, Vol. 5 of Senate Documents, 54th Congress, second session.

The facts peculiar to the Doherty case are as follows:

The proceeding was instituted by the filing of a petition by Doherty in the superior court for Douglas county, Wisconsin, in which he alleged that he was the owner of the north half of the southwest quarter (N½ S W ¼) of section four (4), township forty-seven (47), north, of range eleven (11) west, situated in Douglas county, and that the Northern Pacific Railroad Company had entered upon and constructed its road over and across said premises without authority. It was further alleged that the Northern Pacific Railway Company had succeeded to the rights of the Northern Pacific Railroad Company, and was operating the road so constructed. The petition prayed that Doherty be adjudged the owner of the land so appropriated and that commissioners be appointed under the Wisconsin statute to assess the damages of the petitioner.

To this peition the Northern Pacific Railway Company interposed an answer asserting title by

virtue of the grant of right of way by Section 2 of the act of congress of July 2, 1864, to the Northern Pacific Railroad Company and a purchase of the interest of the last named company.

It appeared that on November 8, 1882, Doherty made homestead entry of the land in question and thereafter made the proof required by law of five years' residence and cultivation, and on February 6, 1890, a patent was issued to him for the land covered by his entry. (Case No. 121, transcript pp. 24-25).

The land was public land on July 2, 1864, and in December, 1883, the Northern Pacific Railroad Company constructed its road across the land and continued to occupy it for railroad purposes until August 31, 1896, when the Northern Pacific Railway Company succeeded by purchase to its rights and has since operated the road. (Case No. 121, transcript p. 25).

The land lies east of Superior City and the portion occupied for railroad purposes is on the line of definits location as shown by the map filed July 6, 1882. (Case No. 121, transcript p. 50).

It is conceded that if the eastern terminus of the road was lawfully fixed at Ashland, the title of the company under its grant of right of way relates back to July 2, 1864, under the decision of this court in Railroad Company vs. Baldwin, 103 U. S. 426, and Doherty's rights under his patent are subject to the earlier grant.

Both the circuit court of appeals and the supreme court of Wisconsin held that the terminus of the road was established at Ashland.

ARGUMENT.

It is clear that if it shall be held that the terminus or point of beginning of the Northern Pacific Railroad was lawfully fixed at Ashland, the judgments of the lower courts must be affirmed.

The claim that the eastern terminus was not established at Ashland is founded on two decisions of the secretary of the interior, overruling the long settled construction of the department upon the question.

The first of these decisions was rendered Nov. 13, 1895, and is reported in volume 21 of Land Decisions, at page 412. The second of these decisions was rendered Aug. 27, 1896, and is reported in volume 23 of Land Decisions, at page 204.

The first of these decisions was rendered by the secretary upon the consideration of a list of indemnity selections, filed by the Northern Pacific Railroad Company, based on losses of lands within the place limits lying east of Superior. The opinion reviews the action taken by the company for the purpose of locating its line, and finally concludes that because the company was empowered to locate and construct a line of railroad from a point on Lake Superior to some point on Puget Sound, it had authority to touch the lake at only one point, and although the company did all things in its power to establish its point of beginning at Ashland, and filed a single map of definite location from Thomson Junction to Ashland, the fact that the line so located and constructed touched the lake

at Superior precluded the company from extending its line eastward from that point. The decision holds that the power of the company was exhausted in this respect when its line once touched the lake. The secretary also strongly inclines in this opinion to the view that the Northern Pacific Company effected a consolidation, confederation and association with the Lake Superior and Mississippi Railroad Company by acquiring a half interest in that company's line from Thomson to Duluth, and thereby fixed its eastern terminus at Duluth. This question, however, was left open for future consideration.

By the decision of the secretary of Aug. 27, 1896, it was held that such a consolidation had been effected, and that Duluth must be considered the terminus of the road.

A preliminary question which was urged upon the court of appeals will be first considered and the two decisions by the secretary of the interior will be examined.

I.

Was the Power to Locate and Construct the Road Between Thomson Junction and Ashland Forfeited by Lapse of Time?

It is contended that the grant of lands to the Northern Pacific Railroad Company east of Thomson Junction lapsed and was absolutely forfeited

by reason of the fact that the portion of the line contemplated by the act, extending from Thomson Junction to Ashland, was not definitely located and constructed within the time specified by section 8 of the act of July 2, 1864, and the acts amendatory thereof.

It is understood that this claim of forfeiture of the land grant is made upon the theory that, when the time expired within which the road should have been completed, *ipso facto* the company forfeited all rights under the granting act, to locate and construct that portion of its line from Thomson to Ashland.

It is submitted that the fallacy of this argument is apparent upon an examination of the provisions of the act of July 2, 1864. By that act three separate and distinct grants were made.

First—The grant by which the persons named were created and erected into a body corporate and politic, and the incidents of perpetual succession, power to sue and be sued, and to have a common seal, were conferred.

Second—The grant of power to locate, construct and maintain a railroad between the termini mentioned.

Third—The grant of lands and right of way to aid in the construction of the road.

By section 8 of this act it was provided:

> "That each and every grant, right and privilege herein are so made and given to, and ac-

> cepted by, said Northern Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence work upon said road within two years from the approval of this act by the president, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the whole road by the fourth day of July, *Anno Domini* eighteen hundred and seventy-six."

By legislation the time for completion of the road was extended to July 4, 1880, (14 Stat. 355; 15 Stat. 255).

This argument is understood to rest upon the proposition that inasmuch as the right of the company to lands east of Thomson depends upon the act of July 2, 1864, and inasmuch as no lands can fall within the terms of that act until identified by the location and earned by the construction of the road, if the company forfeited its right by lapse of time to locate and construct its road between Thomson and Ashland, the location and construction after July 4, 1880, were unauthorized and void, conferred no rights and brought no lands within the operation of the grant. But it is not admitted that by reason of the enforced delay in the location and construction of this portion of the line, the company forfeited the power to comply with the terms of its compact with the United States to complete its road from a point on Lake Superior to Puget Sound.

It is submitted that the grant of the franchise to be a corporation, to build the road and the grant of lands and right of way to aid in its construction

are, under the terms of the act, grants upon conditions subsequent, and that before advantage can be taken of a breach of the conditions, a forfeiture must have been declared by legislative declaration, or established by a judicial proceeding instituted under congressional authority for that purpose.

The whole claim of a forfeiture of the franchise to locate and construct the road between Thomson and Ashland is based upon the provisions of section 8 of the act of July 2, 1864, but the language of that section is "that *each and every grant, right and privilege* herein are so made and given to, and accepted by, said Northern Pacific Railroad Company, upon and subject to the following conditions. * * *"

It will be conceded by counsel for the government that if the grant of lands had attached by definite location within the time limited for the construction of the road and after the title had so vested, there had been a breach of condition subsequent, a declaration of forfeiture would be a prerequisite to an enforcement of the condition. This principle was announced by this court in Schulenberg vs. Harriman, 21 Wall. 44, and that decision has been folllowed in a long line of cases. But counsel insists that a different rule applies as to the enforcement of the condition attached to the grant of power to locate and construct the road, and it is insisted that as applied to this grant the condition is self-executing. But the argument proves too much. If the condition attached to the grant of power to locate and construct the road be self-executing, it must necessarily follow that the same

condition annexed to the grant of corporate existence is in like manner self-executing, and the argument of counsel leads to the conclusion that, because the company was unable within the time fixed by its charter to complete the road to Ashland, *ipso facto* upon the lapse of the time specified for the completion of the road, the company lost not only the power to locate and construct that portion of its line from Thomson to Ashland, but lost as well its franchise of corporate entity, and was thereby dissolved, and thus the grant of lands, the title to which had vested, would have been forfeited without a declaration of forfeiture, contrary to the intent of congress.

The mere fact that the condition attached to the grant of lands is contained in the same language as the condition attached to the grant of power to be a corporation and of power to locate and construct the road is in itself convincing evidence that, if the condition is not self-executing as respects the grant of lands, it is not self-executing as respects the grants of the corporate entity, and of the franchise to locate and maintain the road.

But the identical question here presented has been passed upon by this court. In *Bybee v. Oregon & California Railroad Co.*, 139 U S. 663, the defendant railroad company claimed title to a strip of land for right of way purposes under a grant by act of congress. By the terms of the act the road was required to be completed by July 1, 1880. The act further provided that in case the road should not be completed within the time specified, "this

act shall be null and void." The road was not located or constructed over the premises in controversy until after July 1, 1880, and it was contended that the provision that the act should be null and void in the event that the road was not completed within the time limited was self-executing and that by lapse of time the company forfeited its right to construct its road. The court reviews the authorities and concludes:

> "Upon the whole we think there is nothing to distinguish this case from *Schulenberg v. Harriman,* and that the learned judge of the court below was correct in holding that the railroad company had not forfeited its right to construct its road by failure to complete the same within the time limited."

In the case just referred to the counsel for the plaintiff relied upon certain decisions by the Court of Appeals of New York, where the court held that certain conditions annexed to grants of franchises were self-executing. This court declined to follow these decisions, and cited decisions by the supreme courts of Massachusetts and Louisiana, holding the contrary doctrine, as stating the better rule.

Since the decision by this court in the Bybee case, the New York Court of Appeals have materially modified their former holdings and in the Matter of New York and Long Island Bridge Co., 148 N. Y. 540, state the rule to be that, while it is competent for the legislature to annex a self-executing condition to a grant, strong and unmistakable language must be employed to justify a court in declar-

ing such intention, and the conclusion is reached that the words "all rights and privileges granted hereby shall be null and void" do not render the condition self-executing.

Section 8 of the Northern Pacific charter, declaring that the several grants are upon the conditions named, is followed by section 9, as follows:

> "*And be it further enacted,* That the United States make the several conditioned grants herein, and that the said Northern Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States, by its congress, may do any and all acts and things which may be needful and necessary to insure a speedy completion of said road."

It is, therefore, clear beyond question from the very language of the act that congress did not intend that any forfeiture should take place in the absence of an express declaration.

It was also urged by counsel for the government that in the suit brought by the United States to set aside a patent upon a single tract of land, it is competent for the court to consider the question of the title of the Northern Pacific Company to the whole of its land grant and the right of the company to exercise the franchises conferred by its charter; in other words it was insisted that this suit may be enlarged into a proceeding to decree and enforce a forfeiture of all the grants conferred upon the company because a portion of the line was not com-

pleted within the time limited by the acts of congress. But the rule is well settled that forfeitures for breach of conditions subsequent, annexed to grants, can only be enforced by the grantor, and it rests with congress to determine that advantage shall be taken of a breach of condition and the attorney general cannot act for congress in this behalf.

In *United States v. Repentigny*, 5 Wall. 211-268, this court said:

> "A legislative act directing the possession and appropriation of the land is equivalent to office found. The mode of asserting or of assuming the forfeited grant, *is subject to the legislative authority of the government.* It may be after judicial investigation, or by taking possession directly, under the authority of the government, without these preliminary proceedings."

In *United States v. Southern Pacific R. R. Co.*, 146 U. S. 570-606, the court was considering the question of the forfeiture of a grant to the Atlantic & Pacific Company and said:

> "No power but that of congress could interfere with this right of the Atlantic & Pacific. No one but the grantor can raise the question of a breach of a condition subsequent."

See also: *Schulenberg v. Harriman*, 21 Wall. 44; *Farnsworth v. R. R. Co.*, 92 U. S. 49-67; *McMicken v. U. S.*, 97 U. S. 204.

And in any view of the case, any forfeiture which might have been claimed by the United States has been long since waived by subsequent

legislation and by the construction and operation of the road with the knowledge and consent of the government.

II.

Was the Power of the Company Exhausted When Its Line Touched the Lake at Superior?

The provisions of the act of congress of July 2, 1864, contained in the first section, designating the route of the proposed railroad, are as follows:

> "And said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior, in the state of Minnesota or Wisconsin; thence westerly by the most eligible railroad route as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget's Sound." * * *

It is plain from the express terms of the act that the route between the termini was left to the determination of the company, subject, of course, to the implied requirement that it should be as reasonably direct as the topography of the country would allow, and subject to the authority of the land department to reject a location not conforming to this implied requirement. *Buttz v. Northern Pacific Railroad Company*, 119 U. S. 55; *St. Paul and Pacific Railroad Company v. Northern Pacific Railroad Company*, 139 U. S. 1.

And it seems equally plain that the selection of

the termini, subject to the limitations prescribed by the act, was, in like manner, delegated to the company.

The reasons for not fixing the starting point of the road on Lake Superior are well expressed in the statement of Mr. Sweat, member of congress from Maine, in his advocacy of the Northern Pacific bill before the house of representatives. Mr. Sweat said:

> "For obvious reasons it was determined by your committee not to specify in the bill the precise starting point on Lake Superior, or the place of termination on Puget Sound. To fix these irrevocably by the action of congress would place it in the power of speculators to purchase all the lands adjacent, and by an exorbitant price for them subject the corporation to unjust and heavy burdens in the commencement of their undertaking. Good policy and the interests of the country suggest the propriety of leaving the exact termini of the road undefined by the bill, and to be hereafter selected by the corporation."
>
> Congressional Globe, p. 1699, First Session, Thirty-eighth Congress.

And from the language of the act itself it is clear that congress, having failed to fix the point on Lake Superior from which the road should run, must be held to have intended to confer upon the corporation the power to fix the point. And this conclusion is amply sustained by the authorities.

In *Fall River Iron Works Company v. Old Colony and Fall River Railroad Company*, 5 Allen, 221, an injunction was sought against the defendand railroad company to restrain it from con-

structing its road across plaintiff's land. It was contended that the route adopted by the company was not authorized by its charter. By the terms of its charter, the opinion states, the defendant company was empowered to locate, construct and maintain a railroad "from a point at or near the present terminus of the track of the defendant's railroad in Fall River, in a southerly direction to the line of the state of Rhode Island, to connect with a railroad to be constructed from Newport, in the state of Rhode Island, to the line of the state of Massachusetts." It appeared that the road as located commenced at a point 2,475 feet north of the terminus of the road mentioned in the charter, and extended thence southerly across plaintiff's land. It was contended that the location was not established as contemplated by the charter.

The court said:

> "In seeking for a correct and just exposition of this clause of the statute, the first and most obvious suggestion is, that the legislature did not intend to fix with absolute certainty and precision the point of departure for the new road which the defendants were authorized to build. In using language which was so vague and indefinite as to leave open for future determination the location of this point, it is clear that, owing to the nature of the ground, or for some other sufficient reason, it was not deemed expedient or necessary to fix it with accuracy. It is also clear that in thus omitting to designate it., it was their intention to delegate the power of locating it definitely to the defendants or their agents, and to vest in them the exercise of the needful judgment and discretion to carry into effect the authority which they intended to grant. It follows, that unless

> the defendants have clearly exceeded the limits of this discretion, and have acted either in bad faith or in disregard of the just limits which, by a reasonable construction of the words of the statute, should be put on their power to fix the *terminus a quo*, they cannot be deemed to have invaded the plaintiff's rights, or be held amenable to process restraining them from prosecuting their work and constructing their road according to the plan and location set out and described in the bill."

And it was held that the location was proper.

See also Parke's Appeal, 64 Pa. St., 137. *U. S. v. Northern Pacific R. Co.*, 41 Fed. Rep. 842.

It is submitted that the company had authority to locate the terminus or point of beginning of its road at any point on Lake Superior in Minnesota or Wisconsin. This authority was doubtless subject to the supervision of the land department to the extent that the department was authorized to reject an arbitrary and capricious location of the starting point clearly not within the contemplation of the act. The purpose of the grant being to establish connection between the waterways of the great lakes and Puget's Sound, a location of the terminus at a point on the shore of Lake Superior, shut off from access to the open waters by shoals or reefs, might properly have been rejected, and the company have been compelled to relocate its point of beginning. But this implied restriction upon the authority delegated to the company to fix its starting point is the only limitation other than that contained in the words of the act that this point should be on Lake Superior in Minnesota or Wisconsin.

When the company had thus exercised its right of selection, and had fixed its point of beginning, it had full authority, under the express terms of he act, to locate its line westward from such point by the most eligible route, to be "determined by said company." The company having established its point of beginning, if the adoption of the most eligible route westward required the line to touch the lake a second time it is difficult to conceive from what source the department obtains authority arbitrarily to fix the terminus at such second point, when the terminus had been already fixed by the company by a lawful exercise of the power conferred upon it. If the adoption of the most eligible route from the point of beginning, established by the company, had made it necessary for the line to touch the lake at a second point, and this point had been on a barren shore, shut off from accesss to the open lake, and manifestly such a point as could not have been contemplated by the act as the terminus of the road,the argument is reduced to an absurdity. But, nevertheless, under such a location, the line, having touched the lake at a point west of its established terminus, would have been as much within the secretary's technical construction as is the line actually constructed, which starts as Ashland and touches the lake again at Superior.

It follows from the reasoning of the secretary that if the company had located and built from Ashland and, instead of touching at Superior, had avoided the shore line at that point by five or ten miles, the terms of the grant would have been fully

satisfied, and no objection could have been urged against such location.

But nothing can be found in the language of the act which tends in any degree to support the conclusion of the secretary that the company was prohibited from touching the lake at more than one point. Indeed, there is evidence in the language of the act that this was contemplated. The company was, by the terms of the act, authorized to commence at some point in Wisconsin, and a glance at the map will show that the most direct route from any point on the open lake to Puget's Sound must of necessity touch that portion of the lake included in St. Louis or Pokegama Bays, and that, too, at some point far distant from the natural channels of navigation, and which could never have been contemplated as the terminus of this transcontinental line.

As a matter of fact, when the road was actually located, it was found necessary, because of the character of the country, to swing south of this arm of the lake, but exact information as to facts of this nature, established only after careful surveys, cannot be presumed to have been before congress when the act was passed.

It is insisted by the Secretary of the Interior that it was the intention of congress that the proposed railroad should commence at the extreme western end of Lake Superior, either at Duluth or Superior, but there is nothing in the act or in the history of the times to support this conclusion. When the act was passed there was no city of importance on

the shore of Lake Superior in Minnesota or Wisconsin. Superior had a population of only 500, and Duluth was a hamlet of less than 200 souls.

It is matter of common knowledge that the contest has been sharp between the cities of Ashland, Bayfield, Washburn, Superior and Duluth, as to which is destined to become the principal port on Lake Superior, and this question, if settled at all, has not been settled long.

It was the intention of congress, by the grant to the Northern Pacific Railroad Company, to insure a railroad from such point on the lake as would best accommodate an interchange of traffic with the railroads from the east and south, as well as with the shipping of the lakes. It is manifest that in 1864 there were many reasons for supposing that the principal lake port would be established at some point on the land-locked Chequamegon Bay, which had then been fixed as the northern terminus of two railroads, to aid in the construction of which lands had been granted to the state of Wisconsin. (13 Stat. 67). The natural harbors of Chequamegon Bay were also many hours nearer to eastern ports by the waterways than were Duluth and Superior. These manifest considerations were matters which congress had in view when the granting act was passed, and the conditions remained the same when the company filed its map of general route in 1870 from the mouth of the Montreal river, and its map of definite location in 1882 from a point near Ashland.

It is submitted that without authority upon the

subject it is clear that when the Northern Pacific Company established its terminus on Lake Superior, it had full authority to touch the shore a second time if the adoption of the most eligible route from such terminus to Puget's Sound required it. Authority, however, is not wanting.

In *Boston and Providence Railroad Corporation v. Midland Railroad Company,* 1 Gray, 340, it appeared that the Midland Company was authorized by statute to locate and construct a railroad "commencing at some convenient point on the Norfolk County Railroad; thence through the southerly part of Dedham; thence through or near the westerly part of the towns of Canton and Milton."

The point decided by the court is clear, without further statement, from the following extract from the opinion (p. 367):

> "Again; it is argued that the location, by the act, is to commence at a point on the Norfolk County Railroad, and thence to depart from that line and run thence through the southerly part of Dedham, whereas, in fact, it runs from the *terminus a quo* more than two miles, not from, but on and over the actual location of the Norfolk County Railroad. This, we think, is a misconstruction of the language of the act. It commences at some convenient point on the Norfolk County Railroad in South Dedham, *thence*, not from that railroad or the line of that railroad, but from a point on that railroad, which it may do, if it continues to run from that point three miles on that railroad, and so must run through the southerly part of Dedham, if that railroad is in the southerly part of Dedham, which the act implies."

See also Parke's Appeal, 64 Pa. St. 137; *Kan-*

sas City R. Co. v. Attorney General, 118 U. S. 682.

The secretary of the interior lays much stress in his argument, upon the case of Atlantic and Pacific Railroad Company, 4 Land Decisions, 458. By act of congress of July 27, 1866 (14 Stat. 292), lands were granted to this company to aid in building a railroad upon a route defined by the act as follows:

> "Beginning at or near the town of Springfield in the state of Missouri, thence to the western boundary line of said state, and thence, by the most eligible railroad route, as shall be determined by said company, to a point on the Canadian river, thence to the town of Albuquerque on the river del Norte, and thence, by way of Agua Frio, or other suitable pass, to the headwaters of the Colorado Chiquito and thence, along the thirty-fifth parallel of latitude, as near as may be found most suitable for a railway route, to the Colorado river, at such point as may be selected by said company for crossing; thence, *by the most practicable and eligible route, to the Pacific.*"

In 1872, 1873 and 1874 maps of definite location of sections of the route were filed which carried the definite location of the line to San Buenaventura, on the Pacific ocean, and two other maps which carried the line northward 380 miles to San Francisco. These maps were approved, but no portion of the road from San Buenaventura to San Francisco was ever built.

In 1886, the secretary of the interior laid a rule on the company to show cause why the approval of the maps of definite location from San Buenaven-

tura to San Francisco should not be revoked, and it was held that the approval had been improperly allowed, and that the grant to the company was measured by the most eligible and practicable route form the point of beginning, by way of the courses mentioned in the act, to the Pacific ocean. It was said that it was not within the purpose of the act that the line, after reaching its terminus, the Pacific ocean, should skirt its shores for 380 miles; that when the Pacific ocean was reached the terms of the act were satisfied.

It is sought to draw a parallel between this case and the case at bar but they are widely different.

The Northern Pacific act provides for a railroad, not from Lake Superior, but beginning at a point on Lake Superior. *Boston, etc., Railroad Corporation v. Midland Railroad Company, supra.*

The Atlantic and Pacific grant contemplated a railroad from Springfield, Missouri, via the points mentioned in the act to the junction of the thirty-fifth parallel of latitude and the Colorado river, thence by the most eligible and practicable route to the Pacific ocean. Under these limitations it is manifest that even if the company had authority to fix its terminus as far north as San Francisco, it had no authority to locate its line by way of San Buenaventura.

> "When the termini of a railroad are mentioned, for whose construction a grant is made, the extent of which is dependent upon the distance between those points, the road should be constructed upon the most direct and practicable line. No unnecessary deviation from such line would be within the contemplation of the

grantor, and would be rejected as not in accordance with the grant."

St. Paul & Pacific Railroad Company v. Northern Pacific Railroad Company, 139 U. S., 1-13.

It is manifest, therefore, that the limitations of its granting act that the road should extend from the specified point on the Colorado river *by the most practicable and eligible route to the Pacific ocean,* required by the Atlantic and Pacific Company to locate its road by the most *direct* route to the Pacific Ocean, and that it was permitted neither to make a gigantic bow as it attempted to do nor to diverge from a reasonably direct line so as to strike the ocean at an angle for the purpose of increasing its grant.

The distinction between the cases lies in the fact that the coast line, on which the Atlantic and Pacific must find its terminus, lay at right angles to the course of the road proposed, while the shore line, on which the Northern Pacific company must fix the point of beginning, lay parallel to the general course of its line.

In the former case, the choice of the terminus was restrained by the limitation that the company must build from the Colorado river to this coast line by the most practicable and eligible, and therefore, the direct route; in the latter case *the choice of the point* of beginning was restrained by the limitation that it should be on this shore line in Minnesota or Wisconsin.

It is plain that the Atlantic and Pacific Company could, and, if it complied with the terms of its act, must of necessity reach a point on the Pacific ocean suitable for a terminus, without touching the coast at any other point, whereas, as has been shown, it was not reasonably to be anticipated that the Northern Pacific Company could select such a point on Lake Superior, in the state of Wisconsin, as could reasonably be said to have been contemplated as a terminus by the act of 1864, and construct its road westward towards Puget Sound without touching the lake a second time.

And it is important to notice the circumstances under which the Northern Pacific Railroad Company made the slight change in its route, as defined by the map of general route filed August 13, 1870, so as to touch the city of Superior by its map of definite location filed July 6, 1882.

The consent of the state of Wisconsin was conferred on the company to build its railroad and telegraph line under the act of congress through the state, by an act approved April 10, 1865, and no conditions were annexed as to the location or route of the road. Acting under the consent thus conferred, the company filed its map of general route August 13, 1870, designating a line commencing at the mouth of the Montreal river and extending across the state of Wisconsin, but not touching the lake at Superior City.

This act of the Wisconsin legislature of April 10, 1865, was, on the 10th day of March, 1870, amended by attaching certain conditions, immaterial here, to

the consent theretofore conferred. (Case No. 408, Transcript, pp. 121-122.)

On the 25th day of March, 1872, the Wisconsin legislature passed an act amending the two previous acts and made the consent theretofore conferred conditional by enacting as follows:

> "Any consent heretofore given by the legislature of this state to the Northern Pacific Railroad Company to construct, operate and maintain a railroad and telegraph line in the state of Wisconsin, is hereby made subject to the further conditions, that the said Northern Pacific Railroad company shall construct and forever maintain and operate to some point on the southwesterly shore of the Bay of Superior, between the Nemadji river and Connor's Point, a line of railroad, connecting with and continuous to the main line of said Northern Pacific Railroad, by a route running south of St. Louis river from the junction of said Northern Pacific Railroad with the Lake Superior and Mississppi Railroad, intersecting the western boundary of Wisconsin at some point between the St. Louis and Nemadji rivers, and running thence all the way in Wisconsin between said rivers, and also shall construct and forever maintain, at some place where said railroad shall touch the said Bay of Superior, between the said Nemadji river and Connor's Point, sufficient docks or piers, suitable and convenient for the transfer of passengers and freight from its cars on said road to lake-going craft, and from said craft to said cars, and also, shall establish and forever maintain at some place between the said Nemadji river and Connor's Point, a sufficient depot for the accommodation of passengers. And until the said Northern Pacific Railroad Company shall construct and operate such railroad to the southwesterly shore of the Bay of Superior as aforesaid, and shall so construct said docks or

> piers and the said depot, it shall not be lawful for the said company to construct or maintain or operate any other railroad in Wisconsin." (Case No. 408, Transcript, pp. 122-123.)

Thus it will be seen that the action of the Northern Pacific Railroad Company in altering the line of its road as defined by the map of general route so that the same touched the lake at Superior City was not the result of any vacillation of purpose, but was in obedience to the positive requirements of the state of Wisconsin.

This act and the considerations which induced its passage are items in the history of the times which are important in this case. If, as is contended, the Northern Pacific Company had fixed its eastern terminus at Duluth by consolidation with the Lake Superior & Mississippi Company, and was thereby precluded from extending its line eastward, it could not act under the consent conferred by the state of Wisconsin and an act attaching conditions to this consent was an idle thing.

III.

Did the Northern Pacific Company Effect a Consolidation with the Lake Superior Company Within the Meaning of Section 3, of the Act of July 2, 1864?

By the decision of the secretary of the interior of August 27, 1896, (23 L. D., 204), it was held that

the purchase of the half interest in that portion of the road of the Lake Superior and Mississippi Company extending from Thomson Junction to Duluth, and the joint use and operation of this portion of road by the two companies constituted a consolidation, confederation and association, between the companies within the meaning of sec. 3, of the Northern Pacific act of July 2, 1864, and that thereby Duluth became fixed as the point of beginning of the Northern Pacific Railroad on Lake Superior.

The provisions of sec. 3, under which it is claimed that a consolidation was effected, are as follows:

> "*Provided*, That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act; *Provided further*, That the railroad company receiving the previous grant of land may assign their interest to said Northern Pacific Railroad Company, or may consolidate, confederate and associate with said company upon the terms named in the first section of this act."

Where the line of the proposed railroad was found on the same general route as that of another land grant road, one of three courses was open to the companies

First. Both roads might be constructed without reference to each other; but, inasmuch as it was not the policy of congress to make two grants for two roads between the same points, it was provided that the amount of the earlier grant should be deducted

from the lands granted to the Northern Pacific Railroad Company.

Second. The company receiving the earlier grant might assign its interest to the Northern Pacific Company. This authority was doubtless given in the interest of the prior land grant company, as well as in the interest of the Northern Pacific. If, when the routes of the two roads were laid down, the company having the earlier grant should find its proposed road paralleled for a considerable distance by the transcontinental line of the Northern Pacific, it would be doubtful policy for such company to construct this portion of its line. If its grant, however, required a continuous road between specified termini, it might become subject to a forfeiture for a failure to construct the road the full distance. The provision for assignment of the land grant plainly contemplates the construction of a single road over that portion of the lines which should be found upon the same general route. By this means the Northern Pacific company would receive its full grant of lands and the assigning company would be relieved from its obligation to reach the terminus specified in its grant, and divide its earnings with a competing line.

By the adoption of this course the two corporations would retain their individual identity and the Northern Pacific Company would be entitled to its full grant of lands, unaffected by a conflict with the prior grant.

Third. The last course contemplated by the act,

and the one which it is claimed was adopted, was that of consolidation. But it is to be observed that the "consolidation, confederation and association" provided for is "upon the terms named in the first section of this act." The first section provides:

> "Be it enacted by the Senate and House of Representatives of the United States of America, in congress assembled, that Richard D. Rice (and others) and all such other persons who shall or may be associated with them, and their successors, are hereby created and erected into a body corporate and politic, in deed and in law, by the name, style and title of the 'Northern Pacific Railroad Company,' and by that name shall have perpetual succession, and shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States and may make and have a common seal."

The "terms named" must be found in the language quoted.

A consolidation, confederation and association upon the terms named would effect an amalgamation of the two companies into one, for it is provided that the persons named in the act and *all such other persons who shall or may be associated with them*, are created and erected into a body corporate to be known as the Northern Pacific Railroad Company. By such a consolidation the stockholders of the consolidating company would become the associates of the members of the Northern Pacific Company; the two corporations would become merged, the interests of the several stockholders would be identical and the Northern Pacific Company receiving the full grant would hold it for the benefit of the mem-

bers of the consolidating corporation as well as for the benefit of its own original members.

It is apparent, however, under any construction of the first section, that the two methods provided by its charter, by means of which the Northern Pacific Railroad Company might acquire the lands which would otherwise have been excepted from its grant, were both authorized with the single object of insuring a full grant to the Northern Pacific Company, and of avoiding complications in its adjustment. This is plain from the fact that neither an assignment nor a consolidation was authorized except in the event of there being a prior grant of lands to another company whose line should be upon the same general route as that of the Northern Pacific Railroad.

The purpose of the consolidation authorized by the act being to unify the interests of the two companies *in the lands* which would otherwise be excepted from the Northern Pacific grant, it is difficult to conceive how such transactions as were had between the Northern Pacific Railroad Company and the Lake Superior & Mississippi Railroad Company, which left each company existing as a separate and distinct corporation, and did not affect, in the slightest degree, their interests in their respective land grants, can be held to be a consolidation within the meaning of the act.

Aside from the considerations just mentioned, which, it is submitted, show conclusively that a consolidation in the sense of an association of stockholders, and a merger of corporations, and that

alone, was contemplated, the words "consolidate, confederate and associate," standing by themselves, demand the construction which we have shown is required by the context.

In Morawetz on Private Corporations, vol. 2, sec. 939, it is said:

> "There is no doubt that the general effect of a consolidation is the formation of one corporation by the shareholders of several corporations, and the dissolution of the latter as originally constituted."

The author bases a further statement on the authority of *Houston, etc., R. R. Co. v. Shirley,* 54 Tex. 125, as follows:

> "The distinguishing feature of a 'consolidation' is the union of the shareholders of two companies, thereby forming one company. This is essentially different from the purchase by a corporation of the property and concerns of another company at a foreclosure sale; and the fact that the company whose property was sold was declared by statute to be 'merged and consolidated' with the purchasing company would make no difference."

See also: *Clearwater v. Meredith,* 1 Wall| 25-40; *Shields v. Ohio,* 95 U. S. 319; *Railroad Co. v. Georgia,* 98 U. S. 359.

And this conclusion becomes irresistible when the purpose of the Northern Pacific grant is considered. Congress made this grant to insure a continuous line of road from a Lake Superior port to Puget Sound, to be owned by one company and operated under one management and subject to the demand of the United States for the transportation

of the mails and munitions of war. The road contemplated was a road to be owned and operated as a unit and not to be composed of fragments owned in whole or in part by other companies and leased or held in common by the corporation created by congress. With this purpose in view the consolidation authorized was required to be upon the terms named in section one of the act, under which the stockholders of the consolidating company would become members of the corporate body created by congress, and the Northern Pacific Railroad Company would become the *owner* of the whole road.

The argument of the secretary that these two companies effected a consolidation, besides passing over the qualification that the consolidation authorized must be upon the terms named in section one, and leaving out of consideration the manifest purpose of the consolidation contemplated, finally reaches its conclusion upon an assumption which is wholly false.

It is declared that except for the authority conferred in its charter to consolidate, there was a total want of power in the Northern Pacific Company to purchase a half interest in the line from Thomson Junction to Duluth; and that from the fact that the company is to be presumed to have been acting within its powers, it must follow by presumption that this purchase was under the authority to consolidate conferred by the granting act.

This argument, however, avoids any mention of the provisions of the act of the legislature of Minne-

sota of March 2, 1865 (Case No. 121, Transcript, pp. 36-37; Case No. 408, Transcript, pp. 118-120), conferring the consent of the state of Minnesota for the construction of the Northern Pacific Railroad through that state, which consent was required by sec. 18 of the act of July 2, 1864. This act of the Minnesota legislature, after conferring authority to construct the road as proposed, imposed the following conditions:

> "*Provided*, That should the said company elect to make the eastern terminus of said road east of the eastern boundary of the state of Minnesota, then and in that case, they shall construct, or cause to be constructed, a line of railroad from the said main line to the navigable waters of Lake Superior within the state of Minnesota, of the same gauge as said main line, for which purpose the same powers, rights and privileges are hereby granted to said company as they have or may have to construct said main line within the state of Minnesota."

By virtue of the act imposing the condition the Northern Pacific Railroad Company not only received the power to maintain and operate a line to Duluth, separate and distinct from its main line, but its authority to maintain its line across the state of Minnesota was dependent upon its compliance with this requirement. And when it is considered that less than two years before, in August, 1870, the company had put itself on record in the matter of its point of beginning on the lake, by filing a map of general route from the Montreal river, the facts, instead of supporting the proposition that a consolidation was effected, tend rather to the conclusion that

the company had fixed its point of beginning east of the eastern boundary of the state of Minnesota. The company has never claimed an acre of land by virtue of the line to Duluth (Case No. 408, Transcript p. 149), and its maintenance and operation of this line without such a claim is ample evidence that it was held and operated under the powers conferred by the state of Minnesota, for the purpose of complying with the requirement of that state, and that this branch was not, and was not intended to be, a part of the main line contemplated by the act of congress.

There can be no doubt of the authority of the Northern Pacific Railroad Company under the provisions of the Minnesota statute to acquire by purchase a half interest in the line from Thomson to Duluth.

It has been held by this court that authority to build and construct a line between given points carries with it by necessary implication, the authority to purchase a line already constructed between those points. *Branch v. Jesup,* 106 U. S. 468.

And the purpose of the legislature of Minnesota in imposing this requirement upon the company was subserved as well by the means adopted, as by the unnecessary construction of a parellel line to the waters of Lake Superior at Duluth.

In this connection, the action of the two companies in 1873 is important. In the month of February, in that year, the directors of the Northern Pacific Company were informed that claim was made by the officers of the Lake Superior and Mississippi

Company that the effect of the transactions, evidenced by the deed of January 1, 1872, whereby the Northern Pacific Company purchased a half interest in that portion of the line extending to Duluth, was to fix the eastern terminus of the Northern Pacific Railroad at Duluth; and thereupon, by resolution, the directors of the Northern Pacific Company called upon the Lake Superior & Mississippi Company for an agreement construing the agreement of January 1, 1872, that the same should not be held to intend or have intended, to fix the eastern terminus of the Northern Pacific Railroad at Duluth; and thereafter, on the 2nd day of June, 1873, the Lake Superior & Mississippi Company, by resolution of its board of directors duly adopted, agreed with the Northern Pacific Company that the agreement of January 1, 1872, should not be held to intend or have intended that the eastern terminus of the Northern Pacific Railroad should be, or was, by virtue of said agreement, established at Duluth. (Case No. 408, transcript pp. 140-141).

It is clear that the construction of all these transactions and agreements must be reached in the light not only of the legislation of the state of Minnesota, but in view of all the attendant circumstances, and this construction placed upon the agreement of 1872 by the parties is entitled to the greatest weight. This court said in the case of *Chicago v. Sheldon*, 9 Wall. 50, 54:

> "In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation by the parties them-

selves is entitled to great, if not controlling, influence."

There could be no consolidation unless the parties intended to consolidate, and their solemn declaration, evidenced by an agreement entered into when the conditions were the same as when the Northern Pacific purchased a half interest in this branch road, is sufficient in itself to negative the claim that the companies intended to consolidate under the provisions of the Northern Pacific charter.

But it is suggested in answer to this most natural explanation of the purchase of a half interest in the twenty-six miles of road from Thomson to Duluth, that the grant of power by the state of Minnesota to the Northern Pacific Railroad Company, authorizing it to comply with the condition imposed, by connecting its main line with the waters of Lake Superior, by means of a branch to some point within the state, was void for the reason that the state could not confer a franchise on this company created by congress.

There can be no question of intent or of statutory construction, for the act of the Minnesota legislature is clear and unambiguous, and if the power existed in the state of Minnesota to confer on the company a franchise to build or acquire an interest in this branch road, such a franchise was manifestly conferred.

The Northern Pacific Railroad Company, created by federal authority, comprised an association of persons upon whom had been conferred the fran-

chise to exist as a corporation. It was organized under the constitutional power of congress to establish postroads, regulate commerce and provide for the national defense. It was no migrant. It was in no sense a foreign corporation. *Commonwealth v. Texas & Pacific R. Co.*, 98 Pa. St. 90.

Its domicile was the United States, and it was no more a stranger in the state of Miinnesota than a corporation created by the laws of that state. The consent of the state, obtained in compliance with the act of congress, made lawful the operations of the company within the boundaries of the state.

The United States obtained the authority to create this company and to confer upon it the franchise to build a road to the Pacific by virtue of the grant of powers contained in the constitution, and it must be remembered that before the authority of the state to grant this additional franchise can be challenged, some distinct limitation must be pointed out either in the constitution of the United States, or in the constitution of the state.

The power of the legislature of Minnesota to erect into a domestic corporation the same individuals named in the Northern Pacific charter, under another name or under the same name, and to confer on such corporation a franchise to build a branch road to the waters of Lake Superior, would not be questioned, and it is difficult to understand how or why the hands of the state are tied so that she may not confer on this corporation, already created by congress, the power to build a branch road.

There can be no distinction between the authority

of a state to confer corporate powers upon a federal corporation, and the authority to confer a franchise upon a corporation created by the laws of another state. It is doubted if the power of a state to do the latter has ever been questioned. It is a matter of common knowledge that there is scarcely a railroad in the country touching two or more states that does not rely upon legislation of this character for certain of its franchises, and the authority of the states to grant such franchises has been recognized by this court.

In *Pennsylvania Railroad Company v St. Louis, etc., Rd. Co.,* 118 U. S. 290, there was a controversy as to the jurisdiction. The suit was brought in the circuit court for the district of Indiana by the complainant as the successor of the Terre Haute & Alton Railroad Company, a corporation created by the state of Illinois. It was insisted by the defendants, certain of whom were citizens of Indiana, that the Terre Haute & Alton Company and the complainant, its successor, were Indiana corporations. The question turned upon the effect of certain Indiana legislation and the court held that the Indiana legislation merely *conferred a franchise* on the Illinois corporation to operate a road in Indiana, but did not make it an Indiana corporation. To the same effect is *Goodlett v. Louisville etc. Rd. Co.*, 122 U. S. 391.

In *California v. Pacific Railroad Companies,* 127 U. S. 1, the court considered certain assessments by the state of California of the property of various state railroad corporations, upon which con-

gress had conferred franchises to build and maintain railroads. It was insisted by these companies that their federal franchises had been assessed in bulk with their other property, that these franchises were not taxable by the state and that the whole assessment was therefore void. The claim so made required the court to examine the legislation under which the several companies were created, and from which they derived their franchises.

Speaking of the organization and franchises of the Central Pacific Railroad Company, the court said:

> "Originally, the Central Pacific Railroad Company of California had only power to construct a railroad from Sacramento to the eastern boundary of the state. Congress, by act of 1862, authorized the company (in the words of the act) 'to construct a railroad and telegraph line from the Pacific coast, at or near San Francisco or the navigable waters of the Sacramento river, to the eastern boundary of California, upon the same terms and conditions, in all respects, as are contained in this act for the construction of said railroad and telegraph line first mentioned (the Union Pacific), and to meet and connect with the first mentioned railroad and telegraph line on the eastern boundary of California.' * * * *
>
> "This important grant, though in part collateral, to, was independent of, that made to the company by the state of California, and has ever since been possessed and enjoyed."

The foregoing argument has been presented upon the assumption that there is no provision in the Northern Pacific charter authorizing the company to take this grant of power from the state of Minnesota. But the provisions of the charter must not

be overlooked, and it is submitted that authority is there conferred in express terms to receive and exercise the franchise conferred by the state of Minnesota.

> "Sec. 17. *And be it further enacted,* That the said company is authorized to accept to its own use, any grant, donation, loan, power, franchise, aid or assistance which may be granted to, or conferred upon, said company, by the congress of the United States, by the legislature of any state, or by any corporation, person, or persons; and said corporation is authorized to hold and enjoy such grant, donation, loan, power, franchise, aid, or assistance to its own use for the purpose aforesaid."

The section authorizes the company to accept to its own use any grant, power or franchise which may be conferred upon it by any state, and to hold and enjoy such grant, power or franchise "to its own use for the purpose aforesaid." Manifestly full authority is here given for the very grant of power which the state of Minnesota conferred. What is "the purpose aforesaid"? Clearly not merely the building and operating a line of railroad to the Pacific, for congress had by the act itself conferred every power and franchise required for that purpose. The power of eminent domain was conferred, and it was competent for congress to confer this power within the states as well as within the territories. *Kohl v. United States,* 91 U. S. 367.

The company being fully empowered to do all those things necessary to the mere building and operating a road from Lake Superior to Puget's

Sound, the "purpose aforesaid" cannot be thus narrowly restricted.

In *Winona & St. Peter Rd. Co. v. Barney,* 113 U. S. 618, 625, speaking of the act of 1857, granting lands to the state of Minnesota to aid in the construction of railroads, the court said:

> "The solution of these questions depends, of course, upon the construction given to the acts making the grants; and they are to receive such a construction as will carry out the intent of congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed as well as to the purpose declared on their face, and read all parts of them together."

And the court added:

> "The policy of the government was to keep the public lands open at all times to sale and pre-emption, and thus encourage the settlement of the country, and, at the same time, to advance such settlement by liberal donations to aid in the construction of railways."

And what was true of the purpose of congress in granting lands to the state of Minnesota is pre-eminently true of its purpose in making the grant for a railroad through the wilderness across which it was proposed to build the Northern Pacific Railroad. The principal and indeed the primary purpose of congress in passing this act was to encourage and render possible the settlement and development of a vast domain till then practically unknown and inaccessible. There was but a scanty popula-

tion on the Pacific coast, and little, if any, settlement in the country to be traversed. The conditions existing in 1864 demanded no post route and there was no commerce to be served, but the grant was made and the road was built solely with a view to the changed conditions to be brought about by the means adopted. *U. S. v. Union Pacific R. Co.*, 91 U. S. 72.

The extent of the land grant conferred is itself a sufficient argument that congress did not intend to deprive the company of the necessary means of rendering the construction of its transcontinental line a practicable enterprise. A section of land forty miles distant from a railroad is as worthless as if a thousand miles distant, and but for the construction of branch lines the bulk of the lands granted to aid this great undertaking would have been a burden and not a benefit. And if the Northern Pacific Railroad Company had had no power to construct or to aid in the construction of such roads they would never have been constructed. It is well known that even under the present conditions, the earnings of scarcely a single branch line tributary to the Pacific roads are sufficient to justify their operation, except as feeders for the through lines. As independent enterprises, they could never be maintained.

Finally, independent of the Minnesota legislation and of the provisions of section 17 of the charter, the power to build or acquire by purchase a half interest in the twenty-six miles of road from Thomson Junction to Duluth, to be operated as a

branch line or feeder to the transcontinental road, is a clear incident of the general powers conferred by the charter.

In *Green Bay, etc., R. Co. v. Union Steamboat Co.*, 107 U. S. 98, the supreme court said:

> "The general doctrine upon this subject is now well settled. The character of a corporation, read in connection with the general laws applicable to it, is the measure of its powers, and a contract manifestly beyond those powers will not sustain an action against the corporation. But whatever, under the charter and other general laws, reasonably construed, may fairly be regarded as incidental to the objects for which the corporation is created, is not to be taken as prohibited."

See also *Union Pacific Ry. Co. v. Chicago etc. R. Co.*, 10 U. S. A. 98.

Bearing in mind the purpose for which congress created this corporation and conferred upon it the grant of lands, and bearing in mind that the only way in which that purpose could have been effectuated was by means of such franchises as that conferred by the state of Minnesota, can there be any doubt of the power of the state to grant, or of the company to enjoy, the franchise conferred?

Returning to the first premise in the argument, which, it is claimed, establishes a consolidation, it will be observed that the fact is assumed that the lines of the two roads are found upon the same general route. It is apparent that this is a necessary premise, for only where this condition existed was a consolidation authorized. There is, however,

nothing to support this conclusion thus assumed, except a course of reasoning in a circle.

It is said, first, that the company fixed its point of beginning on Lake Superior at Duluth, and having located to Thomson Junction, it follows that the lines of the two roads were in the same general route. But the fact that the point of beginning was at Duluth depends upon the fact of consolidation, and it is not contended that Duluth was so fixed as the eastern terminus, unless a consolidation is established. The act only authorized a consolidation where the routes of the two roads were on the same general line. This condition required that there should be two points common to both roads, and both of these points, to answer to the conditions of the act, must be points upon the line of the Northern Pacific Railroad located under the act of congress. Thomson Junction was manifestly such a point, but if the Northern Pacific Company acquired an interest in the line to Duluth for the purpose of complying with the Minnesota legislation, Duluth would not be such a point, but, at most, would be a terminus of a branch line. In other words before it can be said that Duluth was on a point on the main line of the Northern Pacific Railroad located and constructed under the act of congress, some fact must appear from which it may be shown that the Company exercised the power of selecting its point of beginning, conferred by the act, in favor of Duluth.

The whole argument loses sight of the fact that everything which the company had done up to this

time was with the manifest intention of establishing its point of beginning near Ashland.

It is submitted, furthermore, that if the Company had seen fit to locate its point of beginning at Duluth this very fact would have precluded it from effecting a consolidation with the Lake Superior & Mississippi Railroad Company. Thomson Junction does not lie on the direct route from Duluth to Puget Sound, and, if the company had filed a map of definite location showing its point of beginning at Duluth, and its course by way of Thomson Junction to Puget Sound, the department would have been instant in its demand for proof that a reasonably direct course westward from Duluth was impracticable because of the conformation of the country, and, in the absence of such proof would have rejected such a map, and properly under the authorities cited in an earlier part of this brief.

Upon another ground it is earnestly submitted that the lines of the Northern Pacific Company and the Lake Superior & Mississippi Company cannot be said to be upon the same general route. The purpose with which the first proviso was inserted in the Northern Pacific act was to guard against bestowing land grant aid for the construction of an unnecessary piece of road. It was against the policy of congress to encourage the building of a road to parallel and compete with another road already constructed or assured. But it provided for a deduction from the Northern Pacific grant only where the route of another company having an earlier grant was found upon the same

general line. What did congress mean by the words "Same general line?" Manifestly, if two roads lay parallel for a distance of one mile or two miles when approaching a common terminus, and then diverged, the routes could not be said to be on the same general line within the meaning of the proviso. The meaning of the language must be found in the purpose for which it was employed. As has been said, that purpose was to avoid granting aid to two parallel and competing lines, either of which could accommodate the traffic. Where the two roads were found on the same general line, it was provided that the company having the earlier grant might assign to the Northern Pacific Company its interest in the lands which would otherwise be deducted from that company's grant, with the plain purpose of allowing the Northern Pacific Railroad Company to earn its full grant, and contemplating the construction of but one road where the proposed lines were on the same general route. If the routes, Northern Pacific Railroad and the Lake Superior & Mississippi Railroad, from Thomson Junction to Duluth, were on the same general line, an assignment of its land grant by the Lake Superior & Mississippi Company, and its abandonment of construction north of Thomson, would have fixed its terminus in the pine barrens only twenty-six miles from the waters of Lake Superior. It is true that at this point passengers and freight could have been transferred to the Northern Pacific Railroad and transported to Duluth over that road; but it is also true that such a makeshift

would not have reasonably accommodated the traffic between St. Paul and Duluth. The inconvenience to passengers would have been unendurable, and the expense of transferring freight would have been vastly greater than the cost of operating the road a few miles farther to a natural terminus on Lake Superior. The two roads, if actually constructed, the one from Duluth by way of Thomson to Puget Sound, and the other from Duluth by way of Thomson to St. Paul, could in no sense be said to be parallel and competing lines. If one had been completed when the other was projected, the fact would not have been considered for an instant in determining the policy of granting aid for the construction of the whole projected line.

The general direction of one road is north and south; the general direction of the other east and west; and the two roads are as far from being on the same general line as it is possible to conceive.

IV.

The Perham Map.

In the interest of Doherty and the United States certain facts are included in the agreed statements relating to a map of the proposed general route of the Northern Pacific Railroad transmitted to the secretary of the interior March 6, 1865, and an argument is based on the filing of this map to support the conclusion that the company manifested

an intention to fix the point of beginning of its road at or near Duluth.

It is agreed that this map marked Exhibt A in the Doherty case and Exhibit 1 in the United States case, is a true and correct copy of a certain map or plat now in the office of the commissioner of the general land office, which said map or plat was transmitted by Josiah Perham, president of the Northern Pacific Railroad Company, to the secretary of the interior on the 6th day of March, 1865. (Case No. 121, transcript p. 53; Case No. 408, transcript p. 103.) With the original map Mr. Perham sent a letter stating that he had designated upon the map the general line of the Northern Pacific Railroad from a point on Lake Superior in *Wisconsin*. (Case No. 121, transcript p. 53; Case No. 408, transcript p. 104.)

Upon receiving this map and letter, the secretary transmitted them to the commissioner, suggesting a withdrawal of lands along the line in Minnesota and *Wisconsin*. (Case No. 121, transcript p. 54;

Upon receipt of the map by the commissioner of the general land office, that officer, upon June 22, 1865, addressed a communication to the secretary, recommending that the map be rejected for the reason that it did not conform to the regulations of the department. (Case No. 121, transcript p. 101; Case No. 408, transcript pp. 105-107.)

Case No. 408, transcript p. 104.)

It further appears in the United States case that there is endorsed upon the said letter the words "Sec'y sustains Comm's refusal," (Case No. 408,

transcript p. 108) and that, except as above stated, the department of the interior has never taken any action under or relative to said map, or made any withdrawals of lands thereunder. (Case No. 408, transcript p. 109.) In the Doherty case it is stipulated that the recommendation of the commissioner was approved by the secretary by endorsement on the letter of the commissioner. (Case No. 121, transcript p. 101.)

An examination of the map discloses two lines extending westward from Lake Superior, and uniting about one hundred miles west of the boundary line between Minnesota and Dakota. The lower of these two lines commences at a point in Wisconsin near the mouth of the Montreal river, but over its whole course is drawn a wavy line of erasure. The upper line commences at a point on Lake Superior at or near the present site of Duluth.

The map presents an alteration apparent upon its face, and, reading the letter of President Perham, written to accompany and explain the map, it will be seen that he describes but one line upon the map, and that line from a point on Lake Superior in *Wisconsin*, by which the conclusion is supported that when the map was filed the only line shown was the lower line from the Montreal river, and that this line was erased and the upper line added at some time after the filing of the map. And this conclusion is much strengthened when it is considered that the letter from the secretary to the commissioner, written after the map was received, and referring to the letter of Mr. Perham, suggests a

withdrawal for ten miles in width in Minnesota and Wisconsin. An examination of the map renders it extremely doubtful if a withdrawal of ten miles on the upper line would reach the Wisconsin boundary.

It seems clear that in order to render the map admissible, the patent alteration should have been explained.

Greenleaf on Evidence, Vol. I, Sec. 564 (15th Ed.).

In any event it is clear that the company acquired no rights whatsoever under this map and that it was ineffectual for any purpose. It appears that the map has never been recognized by the department, but, on the contrary, that it was rejected. The indorsement upon the letter of the commissioner of the general land office of the words "Sec'y sustains Comm's refusal" is sufficient evidence of the fact there stated, even if unsupported by the agreed fact that thereafter the department failed to recognize the map. A public record kept in obedience to the requirements of the law is evidence of the facts therein recited.

In *Galt v. Calloway*, 4 Peters 332, the court said:

> "The register of the land office keeps a record of all entries and surveys, and on his official certificates patents are issued by the government. His records are always under his control, and all entries made in them are made by himself or by a person authorized to act for him. As the records of this office are of great importance to the country, and are kept under the official sanctions of the government, their contents must always be considered, and they

> are always received in courts of justice as evidence of the facts stated."

In any view of the questions just presented, the map is clearly inadmissible in evidence for the reason that no facts are shown conferring any authority on Mr. Perham, as president, to take action on behalf of the company in locating the line of its railroad. On the other hand, it appears by the record that the minutes of the board of directors of the company, from the first meeting of the board, December 7, 1864, up to a date long after the filing of the Perham map, show no action whatever by the board with reference to locating the line. (Case No. 121, transcript p. 100; Case No. 408, transcript p. 108.)

The powers and duties of the president, as prescribed by the by-laws adopted by the company January 11, 1865, give him no such authority as that sought to be exercised. (Case No. 121, transcript p. 100; Case No. 408, transcript pp. 109-110.)

There is no implied authority in the president of a railroad corporation to act for the company in locating its line. "His powers over its business are simply the powers of an agent such as are delegated to him by the directors." 1 *Wood on Railroads*, p. 494.

In *Walworth County Bank v. Farmers' Loan & Trust Company*, 14 Wis. 351, it was held that there was no implied authority in the president of a railroad company, by virtue of his office, to sell 25,000 ties belonging to the company, and that to support a title depending on such a sale, it was essential to prove actual authority in the president.

It is pertinent that in the years 1866, 1867, 1868 and 1869, the Northern Pacific Railroad Company caused exploring and surveying parties to be put into the field for the purpose of ascertaining the most practicable route for a railroad, to be constructed under the provisions of the act of congress, from a point on Lake Superior, in Minnesota or Wisconsin to Puget Sound, and that these parties made surveys of various lines for railroad routes, commencing at about ten different points on Lake Superior and extending westwardly therefrom, and from time to time reported to the board of directors of the company the result of such surveys and explorations. (Case No. 121, transcript p. 38; Case No. 408, transcript p. 110.)

It appears, therefore, that in the year 1865 the directors of the company had acquired no adequate information upon which to base a judgment as to the practicable location of even the general route of the road.

This court has considered this map, and held that it was inoperative as a location of the road. *United States v. Northern Pacific R. R.*, 152 U. S. 248, 292. See also *Oregon & C. R. R. Co. v. United States*, 77 Fed. Rep. 67.

V.

The Location and Construction of the Northern Pacific Railroad.

But the decision of this case does not depend on whether the filing of the Perham map was author-

ized or unauthorized, or on what vague purposes the company may have had in 1865, when it was without accurate knowledge of the country to be traversed by its railroad. The question is, did the company finally exercise the power conferred upon it to select its point of beginning on the lake, and its line of route westward, and did it select Ashland as that point?

The record facts as to location and construction may be repeated. August, 13, 1870, the company transmitted to the secretary of the interior a map of the general route of its proposed railroad from the mouth of the Montreal river to the Dakota boundary. This map was accepted by the secretary and by him caused to be filed in the office of the commissioner of the general land office. (Case No. 121, transcript pp. 39-40, Exhibit 1; Case No. 408, transcript pp. 123-124, Exhibit 4.)

On May 9, 1882, the company duly adopted its line of definite location from Thomson Junction to a point a few miles west of the Montreal river, and a few miles east of Ashland, and on July 6, 1882, a duly certified and authenticated map of the line of definite location so adopted, was transmitted to the secretary of the interior, who accepted the same and caused it to be filed in the office of the commissioner. (Case No. 121, transcript pp. 42-44, Exhibit 2; Case No. 408, transcript pp. 125-127, Exhibit 6.)

On August 20, 1884, the board of directors of the railroad company adopted a resolution fixing the point of beginning at the city of Ashland, and a cer-

tified copy of this resolution was transmitted to the secretary of the interior, December 3, 1884. The point so fixed as the point of beginning was on the line of definite location of 1882, and about twelve miles west of the most easterly point on this line. (Case No. 121, transcript pp. 47-49; Case No. 408, transcript pp. 133-135.)

Upon receipt of the resolution of the directors fixing the point of beginning at Ashland, the commissioner adopted the terminal so fixed, and prepared a diagram showing the same and the limits of the land grant, with reference thereto, and issued instructions for the adjustment of the grant upon this basis. (Case No. 121, transcript pp. 48-49, Exhibit 3; Case No. 408, transcript p. 134-135, Exhibit 7.)

The railroad from Thomson Junction to Ashland was duly constructed, and, on the recommendation of the commissioners appointed to examine the same, was accepted by the president of the United States, in the years 1881, 1882, 1883 and 1884.

These facts bring the case clearly within the plain construction of the act and of the authorities construing similar acts.

In *Kansas Pacific R. Co. v. Dunmeyer*, 113 U. S., 629-634, the court said:

> "We are of the opinion, that, under this grant, as under many other grants containing the same words or words of the same purport, the act which fixes the time of definite location is the act of filing the map, or plat, of this line in the office of the commissioner of the general land office. * * *. The company makes its own preliminary and final surveys by its own

> officers. It selects for itself the precise line on which the road is to be built, and is, by law, bound to report its action by filing its map with the commissioner, or rather in his office."

In *Sioux City, etc., Land Co. v. Griffey*, 143 U. S. 32, the court, commenting on the case last cited, and others, said:

> "The reasoning of these cases is applicable here. The fact that the company has surveyed and staked a line upon the ground does not conclude it. It may survey and stake many, and finally determine the line upon which it will build, by a comparison of the cost and advantages of each and only when by filing its map it has communicated to the government knowledge of its selected line, is it concluded by its action."

See also:

> *Van Wyck v. Knevals*, 106 U. S. 360-366; *Walden v. Knevals*, 114 U. S. 373.

Unless some facts exist showing an exercise of the power to fix the point of beginning at some point other than Ashland, the filing of the map of definite location, followed by the resolution of the board of directors, establishing the point of beginning at Ashland, must be conclusive. And there are no such facts. The company never filed a map to Duluth, and never claimed or intended its branch to that point to be a part of its main line. The company never having exercised the power to establish its point of beginning at Duluth, its definite location and construction to Ashland was competent and is conclusive in determining the location of the road. *Western Pennsylvania R. R. Co.'s Appeal*, 99 Pa. St. 155.

The charge is made in one of the decisions of the secretary above referred to, that the line constructed from Thomson Junction to Ashland was an afterthought, and that no intention existed to construct as far east as Ashland until it became apparent that the line from Bayfield to Superior contemplated by the grant to Wisconsin by the act of May 5, 1864, had been abandoned. The filing of the map of general route in 1870, is an answer to this, and, further, the record shows that the line to Ashland was definitely located, and constructed, several years before the road was contemplated to Puget's Sound.

The road was both located and constructed in sections, which were afterwards united, which course was fully authorized by the granting act. *St. Paul and Pacific Railroad Co. v. Northern Pacific R. Co.*, 139 U. S. 1-19.

Construction was extended west from Thomson Junction to a point fifty-five miles west of Helena, Montana, and east from Wallula Junction, Washington, to the point fifty-five miles west of Helena, and these sections were completed and united in 1883. From a point near Wallula Junction the road was extended to Tacoma, on Puget Sound, in 1885, 1886 and 1887, a distance of more than 300 miles (Case 121, transcript p. 49; Case No. 408, transcript pp. 135-136.)

It is submitted that no sound argument can be based on these facts to support the proposition that the Northern Pacific Company lost its rights from Thomson to Ashland, when that portion of its road

was completed three years before its line over the Cascade mountains.

Denver & Rio Grande R. R. Co. v. Alling, 99 U. S. 463-477.

VI.

The Acceptance of the Map of Definite Location Vested the Grant of Right of Way and is Conclusive

In the cases of *Van Wyck v. Knevals,* 106 U. S. 360; *Kansas Pacific R. Co. v. Dunmeyer,* 113 U. S. 629, and *Walden v Knevals,* 114 U. S. 373, the court considers the question of what constitutes a location and what is necessary to constitute an approval of a map of definite location by the land department. In *Walden v. Knevals,* the court said:

> "Since the decision in that case (*Van Wyck v. Knevals*) the court in *R. Co. v. Dunmeyer,* 113 U. S. 629, has reconsidered the question and come to the same conclusion, the receipt of the map in the land office without objection being considered as equivalent to its acceptance."

The action taken by the secretary and commissioner upon receipt of the map of definite location in 1882 presents a much stronger case than a mere receipt without objection, for the secretary directed and the commissioner made withdrawals of land forty miles on each side of the line from Thomson to Ashland.

There can be no doubt that the map was approved, and the map being approved and the road located, the title to the right of way vested by relation

as of July 2, 1864. *St. Joseph, etc., R. Co. v. Baldwin*, 103 U. S. 426.

The title to the right of way having become vested by the approval of the location, the secretary of the interior was powerless, in 1895, to disturb the rights acquired under the decision of his predecessor. The secretary, in his opinion, seeks to evade this conclusion by declaring that the act of the department in approving the map in 1882 was a nullity because of a want of jurisdiction. It is argued that the department was without jurisdiction to approve the location of a line touching the lake at more than one point. This argument has already been considered, but it finds a further answer in the decision in *Noble v. Union River Logging Co.*, 147 U. S. 162. In this case the following facts appeared:

The Union River Logging Company was incorporated in 1883, under the laws of the territory of Washington, for the purpose, as declared by its articles, of maintaining a logging railroad of about ten miles in length. In 1888 it amended its articles so that its object was declared to be to construct and maintain a railroad and telegraph line over a much longer route, and to carry passengers and freight, and also to carry on a general logging business. For the purpose of acquiring a right of way through the public lands under the provisions of the act of Congress of March 3, 1875, (18 Stat. 482), the company filed in the year 1889, at the district land office, its articles of incorporation,

and other documents required, together with a map showing the route of its road through the public lands. These papers were transmitted to the commissioner and by him to the secretary, who approved them. Subsequently Secretary Noble, who had succeeded Mr. Vilas, by whom the approval had been allowed, entered an order revoking this approval, and, upon a bill in equity being filed to enjoin the secretary and commissioner from executing the order revoking the approval, the defendants answered, that since approval of the map, it had come to their knowledge that the plaintiff company was a mere private logging corporation, and was in no sense a common carrier, and that the act of congress granting the right of way through the public lands did not contemplate such a grant to companies other than common carriers. The hearing being had upon bill and answer, the facts above stated were admitted. It was contended by the defendants that, inasmuch as the plaintiff company was not such a company as was contemplated by the act of 1875, the approval of its map by Secretary Vilas was an act done without jurisdiction and was void. The court held, however, that the question as to the character of the company was properly before Secretary Vilas, and that by his approval of the company's map this question was concluded in its favor. It was held, further, that by virtue of the approval of the map the right of way vested in the company, under the present grant contained in the act of 1875, and the court said:

"A revocation of the approval of the secre-

> tary of the interior, however, by his successor in office, was an attempt to deprive the plaintiff of its property without due process of law, and was, therefore, void."

The parallel between the Noble case and the case at bar is plain. As has been shown, a discretion was committed to the land department to be exercised in accepting or rejecting the location of the Northern Pacific Railroad. As we have shown, the company had authority, under its grant, to select its point of beginning on Lake Superior, and its route from such point westward to Puget's Sound. This authority to select its point of beginning was subject to the authority of the department to require that it should be such a point as was reasonably contemplated by the granting act, and the department could have rejected a selection of a point inaccessible for lake vessels. When the point of beginning was properly selected and approved by the department, the location of the route westward was also subject to the approval of the department to the extent of requiring the road to be located on a reasonably direct line. The judgment approving the selection of the point of beginning and the location of the route necessarily depended upon questions of fact, and the decision of the department upon these questions, and its ultimate approval of the line, must be held to be conclusive, as was the similar decision in the case last considered.

Further, the approval of the company's definite location must be held to be a determination by the executive that the transactions with the Lake Su-

perior & Mississippi Company did not amount to a consolidation, for the conclusion that Ashland was the point of begining must negative the claim that Duluth was such point, and the secretary must have found that Duluth was *not* the point of beginning when he found Ashland was the point.

It appears that, as construction progressed between Thomson Junction and Ashland, this portion of the road was examined in three sections by commissioners appointed for that purpose by the president of the United Sates under Sec. 4 of the Northern Pacific granting act. This section provided that whenever twenty-five consecutive miles of road should be ready for the service contemplated, the president should appoint three commissioners to examine the same, and if it should appear "that twenty-five miles of said railroad and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the president of the United States."

The commissioners appointed duly examined the road constructed from Thomson Junction to Ashland, and reported that the same had been constructed in all respects as required by the act, and, on the recommendation of the secretary of the interior, these reports were approved by President Arthur.

It is submitted that this examination and approval constitutes a finding by a special tribunal, which is conclusive on the question of proper location and construction, under the act. If the ques-

tion whether the road was located and constructed on the line contemplated was a question properly for the determination of the commissioners, there is no doubt but that their decision is final.

And the terms of the act providing that the commissioners shall report whether the railroad has been completed in a good, substantial and workmanlike manner, "as in all other respects required by this act," seem to include the requirements as to location as well as the requirement as to material.

The grant to the Southern Pacific Railroad Company contains a like provision for the examination by commissioners, and, in *United States v. Southern Pacific R. Co.*, 45 Fed. Rep. 596, where a question arose as to whether a certain company was the Southern Pacific Company referred to in the grant, the court held that the appointment of such commissioners and the acceptance of the road constructed upon their report were acts of the United States recognizing the company in question as the Southern Pacific Company, and were binding.

And every presumption which supports the title of the company to its right of way under the grant vested by the approval of its map of definite location supports its title to the adjacent land grant. The same consideration must control the judgment of the court in a suit to cancel a patent for a tract of land presumptively within the limits of the grant, as if the suit were one to vacate and annul the approval of the map of definite location, and thus divest the company of the title of the right of way which it has enjoyed for fifteen years.

The court said in *United States v. Iron Silver Mining Co.*, 128 U. S. 673, 676:

> "The presumption attending the patent, even when directly assailed, that it was issued upon sufficient evidence that the law had been complied with, by the officers of the government charged with the alienation of public lands, can only be overcome by clear and convincing proof."

The reason for this rule is that the patent is evidence of the judgment of the special tribunal to which the matter has been committed.

And the same rule must apply where the judgment of the special tribunal is evidenced by an approval of a map of definite location. But here the judgment of the department is shown by the approval of the map and by the patent itself.

It follows, therefore, that before it can be held that the patents here in question should be canceled, it must be held that the approval of the map of definite location was an act outside of the jurisdiction of the interior department, for if the department had jurisdiction to approve or reject the map, until the approval is set aside the limits of the land grant are defined as well as the grant of right of way.

VII.

The Contemporaneous Construction of the Department of the Interior is Controlling.

The courts have uniformly regarded with the greatest respect the contemporaneous construction placed upon acts of congress by the officers of the executive department to whom was committed the interpretation and execution of those acts. The decisions of the officers charged with the execution of such acts have been regarded as of the highest value as coming from men who are masters of the particular subject and familiar with the history of connected legislation. Where rights of private property have been involved, the courts have gone the full length in applying the reasons for the rule of *stare decisis*, if not the rule itself. The following authorities illustrate the respect paid by the courts to such contemperaneous construction:

> "The officers concerned are usually able men and masters of the subject. Not infrequently they are the draftsmen of the laws they are afterwards called upon to interpret." *U. S. v. McDaniels*, 7 Peters 1.

> "The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overlooked without cogent reasons." *U. S. v. Moore*, 95 U. S. 763.

> "It is a familiar principle of interpretation that, in the case of a doubtful and ambiguous law, the contemporaneous construction of those who have been called upon to carry it into ef-

> fect is entitled to great respect." *U. S. v. Pugh*, 99 U. S. 269.

Justice Field, in *Robertson v. Downing*, 127 U. S. 607-13, said:

> "It is interesting to note the growth of this principle in our law. From the time it was first cautiously initiated in 1827, it has grown in strength every time it was again considered by the courts. Impelled by the force of its inherent justice, every judge who has taken it up has stated it more strongly than it was stated before."

In U. S. v. Burlington Ry. C., 98 U S. 334, the court said:

> "Such has been the uniform contsruction given to the acts by all the departments of the government. Patents have been given, bonds issued, mortgages executed and legislation had upon this construction. This uniform action is as potential and as conclusive of the soundness of the construction as if it had been declared by judicial decision. It cannot at this day be called in question."

The learned judge before whom the case of the United States was heard in the circuit court, after pointing out the long continued and contemporaneous construction by the department, holding the terminus to be at Ashland, recognizes the principle that such construction should be entitled to great weight, if the power of the company to build and operate its road to Ashland were doubtful, which he declares not to be the case. The opinion then continues:

> "The rule that grants by the sovereign, including, of course, all grants by the govern-

ment of franchises or of aid to a corporation, shall be strictly construed applies with full force to any case where the right to exercise the franchise to the extent attempted, or the right to aid, has not been conceded, but has been continually denied on the part of the government. But such rule of strict construction, is not fairly applicable to a case where the corporation has done acts and made large expenditures under the assumption that such acts necessitating such expenditures were within the scope of its franchises, being encouraged thereto by affirmative acts by the proper department of the government, confirmative of the same construction of the franchise. In such a case, in the absence of fraud, and after the lapse of years, the question of the correctness of such construction can scarcely be considered an open question." (Case No. 408, transcript p 167.)

And this statement of the law is fully supported by the language of this court in *United States v. Alabama R. R. Co.*, 142 U. S. 615, where it was said:

> "It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced."

In *Washington & Idaho R. R. v. Coeur d'Alene Ry Co.*, 160 U. S. 77-101, the court said:

> "When a court of law is construing an instrument, whether a public law or a private contract, it is legitimate, if two constructions are farly possible, to adopt that one which equity would favor."

And this contemporaneous construction of the department has been uniform and long continued, and supports the position of the appellees. The map of general route of 1870 was approved and the lands coterminous with the line were withdrawn; the alternate reserved even numbered sections were increased in price to $2.50 per acre, and the United States has reaped the benefit of this increase. The map of definite location was approved and three orders of withdrawal issued. The action of the directors of the company fixing the point of beginning at Ashland was ratified by the commissioner and the withdrawal adjusted accordingly. The construction adopted in 1870 was unquestioned until 1895, and even if the conclusion reached by the secretary in that year could be supported by a logical argument sufficient to render the true construction of the act a matter of doubt, yet the long continued construction, under which the road has been built and private interests have grown up, resting upon the security of the settled interpretation, should be held conclusive at this late day.

C. W. BUNN and
JAMES B. KERR,
Counsel for Defendant in Error and Appellees.